AT

UNITED
NATIONS

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 745

Case No. 797: HUZEIMA

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 15 May 1994, Ali Abu Huzeima, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA, filed an application requesting the Tribunal, inter alia:

"1. To give an order to UNRWA to return me to my job at the same grade or to any other similar post and grade.

2. To pay me in full, effective 23 February 1993, until the date of return to work.

3. To compensate me for all sufferings that I, my wife, children and family have gone through during the whole period effective the date of suspension up to date."

Whereas the Respondent filed his answer on 21 October 1994;

Whereas the Applicant filed written observations on 26 December 1995;

Whereas, on 13 November 1995, the Tribunal put a question to the Respondent, to which he provided an answer on 15 November 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 1 April 1974, as a Clerk "C" at Grade 5, on a temporary indefinite appointment. On 7 November 1974, he was transferred to the post of Despatcher "A" at Grade 6. On 1 December 1975, he was promoted to Grade 7. On 6 July 1980, he was transferred to the post of Vehicle Control Assistant, Grade 9. On 18 July 1981, the Applicant was promoted to Grade 11, as Vehicle Control Officer, and on 1 April 1986, he was transferred to the post of Assistant Field Supply and Transport Officer, Grade 14. On 1 June 1990, he was promoted to Grade 16 as Deputy Field Supply and Transport Officer. On 24 February 1993, the Applicant was demoted and transferred to the post of Administrative Assistant, Grade 10. On the same date, he separated from service on early voluntary retirement.

On 6 October 1992, a meeting was convened to discuss an allegation that the Applicant had assisted a bidder in the completion of a tender document for the supply of shelving. At the meeting, the Applicant stated that, upon request, he had assisted a bidder to complete the form, as the bidder did not speak English. He denied revealing any confidential information. The bid in question, which was the lowest, was deemed to be tainted and excluded from consideration.

On 7 November 1992, the Applicant requested separation from service on medical grounds. He was granted sick leave for several months. On 21 January 1993, he was found to be fit for continued service. On that date, the Applicant was informed that, with effect from 23 January 1993, he would be suspended without pay, pending an investigation. In a memorandum dated 23 January 1993, to the Director of UNRWA Operations, Gaza, the Applicant protested his suspension without pay, asserting that he had not committed any "action against the interest of the Agency". He requested that he be considered "in service but on leave until the investigation is completed."

On 15 February 1993, a Board of Inquiry was appointed. It adopted its report on 23 February 1993. Its findings were:

> "(a) [The Applicant] assisted a tenderer (who was probably illiterate in the English Language) to fill in an Agency Tender document in September, 1992.
>
> (b) [The Applicant] did not inform his supervisor what he had done.
>
> (c) [The Applicant] did not complete the tender document with a view toward securing gain and is therefore not guilty of conflict of interest vis-a-vis the Agency's Area Staff Rules and Regulations (there being no evidence to the contrary).
>
> (d) [The Applicant] has demonstrated poor judgement in the sense that he saw nothing wrong with his actions and as a senior staff member he was unable to perceive he may have been guilty of violating principles of fair tendering and the calling into question the possibility of a conflict of interest both as to the tender of September 1992 and possibly the previous tender of some 18 months ago as stated by ... (...) and ex-FSTO's [Field Supply & Transport Officer's] statement (...).
>
> 12. The Board finds, in conclusion, that the [Applicant's] actions are more ones of improper judgement rather than ones of actual conflict of interest, and as such, a senior staff member of the Agency should have known better."

On 24 February 1993, the Field Administration Officer, Gaza, informed the Applicant that the Director of UNRWA Operations, Gaza, and the UNRWA Representative, Egypt, had reviewed the findings of the Board of Inquiry. They had "decided that you will not be re-instated to your previous job as Deputy Field Supply & Transport Officer. Under Area Staff Regulation 10.2 you will be demoted and transferred to the post of Administrative Assistant, at Grade 10 step 20 level, in the Department of Environmental Affairs with effect from 24 February 1993." He further advised the Applicant that his period of suspension without pay would be converted to suspension with full pay.

In a memorandum dated 24 February 1993, the Applicant informed the Director of UNRWA Operations, Gaza, that he did not accept the demotion. He submitted a request for early voluntary retirement with effect from 23 February 1993. On 27 February 1993, the Applicant requested the Officer-in-Charge, UNRWA Operations, Gaza, to reconsider the decision to demote him and to re-instate him in his post. On 6 March 1993, the Field Personnel Officer, Gaza, advised the Applicant that his request for early voluntary retirement had been approved.

On 22 March 1993, the Applicant wrote to the Commissioner-General, requesting his intervention to allow him to return to his post. On 7 April 1993, he wrote again, noting that action was being taken to fill his post. On 4 May 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 18 August 1993, the JAB adopted its report. Its evaluation and recommendation read, in part, as follows:

"IV. Evaluation and Judgement

19. ...

(a) The Board is of the opinion that the Administration had justifiably imposed a disciplinary measure against the Appellant.

(b) However, the Board can hardly conceive the propriety and proportionality of the measure imposed, taking into consideration the very clean record of the Appellant during his long service with the Agency and his immediate admission of the act of assisting a tenderer to fill in an Agency Tender document for no personal gain.

(c) The Board ascertains that the report of the Board of Inquiry was not incriminating the Appellant inasmuch as it had solely pinpointed his improper judgement as a staff member on one occasion only.

(d) The Board believes that the sequence of events from the time the Appellant was suspended until his option for early retirement was conducive to such

an option and therefore the Board affirms that the Appellant was coerced into opting for early retirement.

V. Recommendation

20. In view thereof, the Board unanimously makes its recommendation that the Administration's decision of 24 February 1993 according to which the Appellant was transferred on demotion from a Grade 16 post to a Grade 10 post be reviewed with a view to providing the Appellant with an opportunity to reconsider his option for early voluntary retirement and that he be served with a disciplinary measure of a milder dimension and that is proportionate with the size of his 'improper judgement' on one occasion only."

On 21 October 1993, the Deputy Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"You will note that the Board concludes that the Administration was justified in imposing a disciplinary measure against you. You will also note the Board's recommendation that your demotion from a Grade 16 post to a Grade 10 post be reviewed with a view to substitution of a less stringent disciplinary measure, thereby giving you an opportunity to reconsider your decision to opt for early voluntary retirement.

I accept the Board's conclusion that the Administration justifiably imposed a disciplinary measure against you. As recommended by the Board, I have also carefully reviewed the actual disciplinary action taken in light of all the circumstances. In doing so, I cannot overlook the fact that your involvement with one tenderer in the course of a tender was improper and, if countenanced, likely to undermine the integrity of the Agency's procurement system. This is particularly so given the position you held as a senior manager and Deputy Field Supply & Transport Officer. However, in order to comply as far as possible with the Board's recommendations, I am prepared to offer you reinstatement into the position of Administrative Assistant, Grade 10 at the Grade 14 level, effective 23 February 1993, when you took early voluntary retirement, with the intervening period between that date and the date of your return to work designated as Special Leave with pay at the Grade 14 level.

> The position offered to you at Grade 14 is four levels higher than originally proposed and is intended to meet the Board's recommendation for a disciplinary measure of a milder dimension and to provide you an opportunity to reconsider your election to take early voluntary retirement. The offer is, of course, contingent upon reimbursement to the Agency of the benefits already paid to you upon your separation."

In a memorandum dated 3 November 1993, to the Field Personnel Officer, the Applicant stated "I accept the offer to occupy GF Grade 14 post." In a reply dated 7 November 1993, the Field Administration Officer advised the Applicant "we will offer you shortly a Grade 10 (not 14) post, which you will occupy under grade protection at Grade 14." On 10 November 1993, the Applicant wrote to the Deputy Commissioner-General requesting clarification of the offer with regard to grade protection. In a reply dated 15 November 1993, the Officer-in-Charge, Headquarters, clarified the offer of reinstatement. On 25 November 1993, the Applicant informed the Field Administration Officer that he would accept an offer of reinstatement to a Grade 10 post at the Grade 14 level "with the same salary or the nearest to the salary I was drawing in my previous post of Grade 16." In a letter dated 19 December 1993, the Field Administration Officer, Gaza, confirmed that the Applicant's salary "would be adjusted to be nearest the salary you were drawing in your previous post." He further stated that this offer was being made "in full and final settlement", concluding "you either accept the offer, which brings the matter to a conclusion, or reject it, in which case any further recourse ... should be addresed to the Administrative Tribunal."

Following further correspondence, on 15 May 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant acted in good faith. He was found to have exercised "poor judgement", which calls for, at most, a written censure. The Respondent's decision to demote the Applicant is disproportionate to the alleged wrong-doing.

Whereas the Respondent's principal contention is:

The evidence demonstrates that the Respondent's imposition of a disciplinary measure against the Applicant was proper and in accordance with the rules.

The Tribunal, having deliberated from 30 October to 22 November 1995, now pronounces the following judgement:

I. The charge against the Applicant is that, sometime in September/October 1992, he helped a neighbour to fill in a tender-form for a contract with UNRWA at Gaza. The Applicant does not deny that he did so. Nor is there any accusation by the Respondent that the Applicant gained financially in any way by his action or that there was any possibility of UNRWA suffering losses.

II. The Applicant states that on 7 October 1992, he was told by the Director, UNRWA Operations, Gaza, that he considered the Applicant's action as a violation of the Agency's Rules. He would, therefore, not be allowed to return to his post as Deputy Field Supply and Transport Officer. The Applicant states that he was also told that he should ask for early voluntary retirement, leave the Agency on medical grounds or face a Board of Inquiry. According to the Applicant, the Director added, that "whatever the findings of the Board of Inquiry, he will recommend my final dismissal".

III. There has been no contradiction of these statements. Indeed, a letter of 3 November 1992, from the Director to the Applicant, in which a reference was made to "several alternatives from which you might wish to choose were discussed at our last meeting" would seem to confirm the statements attributed to the Respondent. The Tribunal finds that the options given by the Director were premature and rather trenchant, and were decided upon before the facts were properly sifted. Yet they continued to govern all the subsequent developments.

IV. An important feature of this case is the Respondent's conclusion that the Applicant, by his admitted wrong-doing, had committed an act that not only violated the "Requirements as to competitive Quotations" (Organization Directive 10), but that he had abused his position as a senior official who had "responsibility for the Agency's procurement system ... and had access to confidential information regarding tenders of Agency supplies". However, the Tribunal finds that the document entitled "Requirements as to competitive quotations" does not specifically deal with the offence the Applicant committed. These requirements refer more generally to safeguarding "the principle of fair competition". There is no clear evidence of conflict of interest. In the circumstances, the Tribunal considers that the action of the Respondent was based on his determination that the Applicant's conduct would, if countenanced, "undermine the integrity of the procurement system". This determination was not unreasonable and the Tribunal finds no substance in the Applicant's accusation that the action against him was motivated by prejudice and was meant to give his job to someone else.

V. There is, however, evidence that in coming to his conclusion, the Respondent was to some extent influenced by what might have occurred eighteen months earlier and of the Applicant's role in

another tender. At the request of the Tribunal, the Respondent supplied the details of this incident. On 11 October (i.e. about the time the Applicant was reported to have helped in filling in a tender), the Field Supply and Transport Officer, who was the direct supervisor of the Applicant, submitted a "strictly confidential" memorandum to the Director of UNRWA Operations, Gaza and the UNRWA Representative in Egypt which contained, among other matters mainly adverse to the Applicant, the following:

> "... 18 months ago, when I had just been transferred to the post of FSTO/G, [the Applicant] brought the same contractor, Mr. Mimnim to quote for the making of the shelves in the Old General Stores. When we awarded this contract to another supplier, D/FSTO brought a letter from Mr. Mimnim stating that he would reduce his prices below that of the lowest bidder. As this contract was only for $1,000 USD no file was kept on this, however the Supply Officer Procurement, Mr. Muhanna and Supply Officer Warehousing, Mr. Matar will attest to this" (emphasis added).

VI. Mr. Muhanna and Mr. Matar were examined in the middle of February 1993 by the Board of Inquiry. At this inquiry, which met after the Applicant had been transferred from Gaza, "Mr. Matar was unable to give an (sic any) information to the Board regarding this question". Mr. Muhanna recalled the incident 18 months before but stated that to his knowledge "[the Applicant] never interfered with other Agency tenders" and generally spoke in favour of the Applicant. He said that this earlier incident should not be confused with the present accusation against the Applicant. Nonetheless, this incident which presumably took place in April/May 1991 had been referred to more than once as indicative of the Applicant's unacceptable conduct and as an aggravation of his offence which is the subject matter of this case. The Tribunal finds no justification for this, especially in view of the excellent PERs the Applicant always had and in view of the fact that the Respondent did not raise this incident in the proceedings before the

JAB pointing out, in fact, that "the Appellant's performance prior to the incident in question was never at stake".

VII. The Board of Inquiry did not make any recommendation and concluded that the Applicant's "actions are more ones of improper judgement rather than ones of actual conflict of interest, and as such, a senior staff member of the Agency should have known better". On the basis of the Board's report, the Respondent decided that the Applicant would "not be reinstated to [his] previous job as Deputy Field Supply and Transport office". He further decided that under Area Staff Regulation 10.2 the Applicant would be "demoted and transferred to the post of Administrative Assistant, at Grade 10 step 20 level, in the Department of Environment Affairs with effect from 24 February 1993". The Applicant considered this decision unfair and did not accept it. He submitted a request for "early voluntary retirement", which he later stated had been made under the pressure of circumstances, but which the Respondent accepted promptly. Eventually, on 4 May 1993, he lodged an appeal with the JAB which, in its report, adopted on 18 August 1993, recommended that "demotion from Grade 16 to Grade 10 be reviewed with a view to providing the Appellant with an opportunity to reconsider his option for voluntary retirement and that he be served with a disciplinary measure of a milder dimension and that is proportionate with the size of his 'improper judgement' on one occasion only". In response to his recommendation, the Respondent was prepared to offer reinstatement into "the position of Administrative Assistant, Grade 10 at the Grade 14 level".

VIII. The Tribunal finds little difference of substance between Grade 10 Step 20 decided on the report of the Board of Inquiry and Grade 10 with protected salary of Grade 14, offered after the JAB reported. There was at this stage much discussion about a permanent job at Grade 10 which was not available but the Respondent said that

a fixed-term appointment could be offered with no risk of separation. The Applicant insisted that since a job at Grade 14 was available, he should be offered it. This controversy was put to rest when on 8 January 1994, the Field Administrative Officer (FAO) informed the Applicant that "you will be offered a Grade 10 Administrative post at Grade 14 - no more and no less". In other words, his demotion from Grade 16 to Grade 10 was confirmed but his salary and prospects were protected. The Applicant was given until 13 January to decide. In a letter of 11 January, the Applicant noted that he was prepared to accept the offer, "but at the same time to raise [his] case to the United Nations Administrative Tribunal for there [sic] final decision." On 15 January, the Applicant was informed by the FAO: "If you decide to pursue your appeal with the United Nations Administrative Tribunal, it will be regarded as a rejection of the offer of reinstatement." The Tribunal notes that, in this case, the Respondent has merged administrative decisions on the recommendation of the JAB with an offer of settlement. The Tribunal considers that it is unacceptable for the Respondent to introduce into correspondence relating to his decision on the JAB report, the content of a settlement proposal with the condition that the Applicant refrain from appealing to the Tribunal.

IX. The Applicant had admitted his mistake in helping a contractor fill in a tender form. The Tribunal can accept that the Respondent might have felt that the Applicant had intended to help the tenderer obtain the contract. However, there is no evidence clearly compelling such a conclusion.

X. On balance, the Tribunal finds that the Respondent's attitude was to an extent predetermined and somewhat arbitrary. In the circumstances, the Tribunal finds that the Applicant is entitled to

some monetary compensation for the irregularities and avoidable uncertainties he was subjected to. The Tribunal assesses such compensation at $5,000.

XI. In the light of the above, the Tribunal:

(1) Orders the Respondent to pay the Applicant US$ 5,000;

(2) Rejects all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 22 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary